

COMMENT

THE ROBINSON-PATMAN ACT AND VERTICAL CONFLICTS IN DISTRIBUTION

The Robinson-Patman Amendment to the Clayton Act¹ provides, in part, that a seller may not discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition.² It is not clear under the act whether a seller may lawfully grant a differential in price which favors direct-buying consumers and commercial users over the seller's own retailer customers, but the trend of present decisions seems to be that such discrimination is not unlawful because it involves no injury to competition. These decisions are logically related to the problem of the legality of sellers' by-passing of wholesalers and other intermediaries in vertical channels of distribution and granting discriminatorily low prices to direct-buying retailers. It is the thesis of this article that countervailing policy considerations require that this current trend be reversed.

Some consideration of antecedent provisions of the Clayton Act and the construction accorded them by the courts is necessary

¹ 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1958).

² The sections of the Robinson-Patman Amendment of primary concern herein, Robinson-Patman Act § 2(a)-(b), 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958), provide as follows:

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing [herein contained] shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on

to an understanding of the Robinson-Patman Amendment. The Clayton Act was passed to overcome inadequacies of the Sherman Act in preventing industrial concentration and to curb practices used by business to monopolize markets; the Clayton Act was primarily a prophylactic measure for combatting incipient monopolization not cognizable under the Sherman Act. Section 2 of the Clayton Act, aimed primarily at predatory price-cutting, made it unlawful for a seller to discriminate among buyers in pricing commodities where the effect of such discrimination might be to lessen competition substantially or to tend to create monopoly in any line of commerce.

Given its broad language, section 2 might have been construed to apply to discriminatory pricing whether it tended to eliminate competition among the purchasers of a product or among the sellers.³ However, when, in *Mennen Co. v. FTC*,⁴ a manufacturer refused to grant wholesaler discounts to a cooperative buying organization of drug retailers which ordered in wholesale lots, and the Commission found the practice discriminatory, the Second Circuit Court of Appeals reversed. The court declared that a seller had a legal right to classify customers and that, as a matter of law, the cooperative was properly classified as a retail organization since its members sold to ultimate consumers. And in *National Biscuit Co. v. FTC*,⁵ the court of appeals for the Second Circuit again reversed the Commission, and upheld a manufacturer's right to grant quantity discounts to a chain store, even though the discounts were based on total purchases of the whole chain system, deliveries were

differences in quantities greater than those so fixed and established: *And provided further*, That nothing [herein contained] shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing [herein contained] shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing [herein contained] shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

³ Clayton Act § 2, 38 Stat. 730 (1914).

⁴ 288 Fed. 774 (2d Cir. 1923), *cert. denied*, 262 U.S. 759 (1923).

⁵ 299 Fed. 733 (2d Cir. 1924), *cert. denied*, 266 U.S. 613 (1924).

made separately to each unit, and there were no savings in delivery costs.

Several years later in *George Van Camp & Sons v. American Can Co.*⁶ and *American Can Co. v. Ladoga Canning Co.*⁷ the Supreme Court recognized that the act was applicable to some price discrimination that tended to lessen competition among buyers, but the *Mennen Co.* and *National Biscuit Co.* cases still raised considerable doubt whether section 2 could become an effective instrument in preventing price discrimination from injuring competition among buyers as well as sellers. Moreover, in its final report on the chain store investigation in 1934, the Federal Trade Commission concluded that section 2 was inadequate to curb excessive concessions to mass buyers.⁸

Thus, an immediate factor behind the demand for a change in the law was the growing power of chain stores; but Congress also designed the Robinson-Patman Act to remedy defects the courts had injected into the Clayton Act. In its report on the Robinson-Patman Amendment to section 2 of the Clayton Act, it was the opinion of the Judiciary Committee of the House that "price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled. . . ." ⁹ It was also felt that the new law was needed for "the preservation of equal opportunity to all usefully employed in the service of distribution comfortably with their ability and equipment to serve the producing and consuming public with real efficiency" ¹⁰ It has also been observed that "the Robinson-Patman Act is an effort 'to preserve traditional marketing channels, (manufacturer—wholesaler—retailer), against the encroachment of mass distributors and chains.'" ¹¹ The foregoing observations suggest that the act has some application to sales which by-pass established channels of distribution.

SALES TO DIRECT-BUYING CONSUMERS

Under an early interpretation of the Robinson-Patman Amendment, some protection seemed to be accorded to retailers who were charged higher prices than consumers who bought directly from the same seller. In *United States Rubber Co.*,¹² the Federal Trade Com-

⁶ 278 U.S. 245 (1929).

⁷ 44 F.2d 763 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1930).

⁸ Federal Trade Commission, "Final Report on Chain Store Investigation," S. Doc. No. 4, 74th Cong., 1st Sess. 51, 95-96 (1935).

⁹ H.R. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936).

¹⁰ S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936).

¹¹ *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345, 353 (E.D. N.Y. 1960).

¹² 28 F.T.C. 1489 (1939).

mission found that United States Rubber Company sold tires through its wholly owned subsidiary, United States Tire Dealers Corporation, "in competition with other retail tire dealers in their respective sales territories. Through said stores respondent sold and offered to sell tires to certain users and consumers thereof . . . at prices . . . lower than the prices charged other retail purchasers."¹³ Accordingly, the Commission ordered respondent to cease and desist from discriminating in price "by selling such products to some users and consumers thereof . . . at prices different and lower than the prices charged other retail purchasers thereof."¹⁴

Subsequent to the *United States Rubber* decision, a line of argument developed which is substantially as follows: it would not be unlawful for a seller to charge the *same* price to wholesalers and retailers as he charged to consumers. If a seller followed such a single price policy, wholesalers and retailers could not compete for the business of the direct-buying consumer since their markup for operating expenses and profit would raise their resale prices above the sale price of the original seller. Since such wholesalers and retailers would be unable to compete if there were no price discrimination, then there is no injury to them and, therefore, no injury to competition if a seller quotes a price to direct-buying consumers that is lower than that which he charges to his wholesaler and retailer customers. *Jarrett v. Pittsburgh Plate Glass Co.*¹⁵ has been cited in support of this proposition,¹⁶ but its authority is questionable. In that case, Pittsburgh sued Jarrett on a note, and Jarrett counter-claimed for a violation of section 2(a), alleging that he was a distributor of Pittsburgh's products, and that Pittsburgh had gone into the retail business in competition with him, and sold goods "for less than they had previously been sold in Macon and at [lower] prices than Jarrett as dealer could afford to sell them . . ." ¹⁷ The counter-claim was dismissed because it was

not alleged that the prices at which sales were made to Jarrett were cut as to others, or that prices in Macon were cut below those made for other like markets, or that there was a refusal to sell to Jarrett at dealer's prices, or that there was any intent or any effect to monopolize the business. The Company could retail its own goods a little cheaper than Jarrett could after buying them at the usual dealers' prices, and that is all.¹⁸

¹³ *Id.* at 1501.

¹⁴ *Id.* at 1505.

¹⁵ 131 F.2d 674 (5th Cir. 1942).

¹⁶ See *Sano Petroleum Corp. v. American Oil Co.*, *supra* note 11, at 354; *Secatore's Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665, 667 (D. Mass 1959).

¹⁷ *Jarrett v. Pittsburgh Plate Glass Co.*, *supra* note 15, at 676.

¹⁸ *Ibid.*

The court did not say in the *Jarrett* case that it would be lawful for Pittsburgh to offer retail prices to the consuming public which were lower than the prices offered to Jarrett.

The first express statement that, if a buyer cannot compete at equal prices, a reduction in price to a favored buyer will not injure the unfavored buyer is found in *A. J. Goodman & Son v. United Lacquer Mfg. Corp.*¹⁹ In *Goodman* defendant was a manufacturer of yellow traffic lacquer used to mark highways. The State of New Hampshire called for bids for a delivered price on 18,000 gallons of yellow traffic lacquer. Defendant quoted for plaintiff a price of 1.85 dollars per gallon, and plaintiff thereupon submitted a bid to the state at a price of 1.97 dollars per gallon. Defendant also submitted a direct bid to the state at a price of 1.75 dollars per gallon. The court granted defendant's motion to dismiss a complaint based on section 2(a).

Defendant, if it desires to bid, can always, without violating the law, submit a bid lower than any at which the plaintiff could offer to sell to the state. It would not violate the law by selling to the state at the same price at which it was willing to sell to the plaintiff. Nor would there be any violation if it sold to the state at a price equal to the lowest price at which any of its competitors would supply lacquer to the plaintiff. In either case defendant's price to the state could be equal to the price plaintiff paid, and hence less than the price at which plaintiff could offer to sell to the state and still make any profit on the transaction. The contract would already be lost to plaintiff, and the fact that defendant lowered his price still further so that it was either discriminatory or unreasonably low in itself, could add nothing to the injury.²⁰

The *Goodman* case cannot, however, be considered controlling as a statement of law under the Robinson-Patman Act, because there was only one contract awarded and one sale, and without two or more sales there can be no basis for determining price discrimination. Moreover, the sale was made to the state of New Hampshire, and the prevailing view seems to be that sales to governmental agencies are without the purview of the Robinson-Patman Amendment.²¹

Nonetheless, the *Goodman* rationale was picked up in *Secatore's, Inc. v. Esso Standard Oil Co.*²² In the *Secatore's* case plaintiff operated two large retail gasoline stations, but had no facilities for selling gasoline off its premises. Defendant Esso was a refiner

¹⁹ 81 F. Supp. 890 (D. Mass. 1949).

²⁰ *Id.* at 893.

²¹ *General Shale Prod. Corp. v. Struck Const. Co.*, 37 F. Supp. 598 (W.D. Ky. 1941), *aff'd on other grounds*, 132 F.2d 425 (6th Cir. 1942).

²² 171 F. Supp. 665 (D. Mass. 1959).

and distributor of petroleum products who had no retail gasoline stations. Defendant did sell to certain direct-buying consumers who took delivery in their own tank trucks or who had their own storage tanks and pumps and took delivery from Esso trucks. Esso charged Secatore's more than it charged the direct-buying consumers, and Secatore's brought an action under the Robinson-Patman Act which was dismissed on defendant's motion for summary judgment. The court observed:

Clearly there would be no discrimination if defendant sold to these ultimate consumers at the same price at which it sells to plaintiff. But even then plaintiff could not compete with defendant for their business for it would as a matter of practical economics have to charge them more than it paid defendant for the gasoline in order to cover its expenses of operation, to say nothing of making a profit on the transaction. If plaintiff cannot successfully compete with defendant for these customers when there is no price differential, it is not harmed by any further reduction which defendant may make in the price it charges to them.²³

The *Secatore's* decision was followed in *Sano Petroleum Corp. v. American Oil Co.*²⁴ Sano, a wholesale distributor of gasoline in a nonexclusive territory in Brooklyn and Queens, had a requirements contract with American, a gasoline refiner, and had to get American's approval to add new customers. Sano brought an action alleging discriminatory sales of gasoline by American to Uneeda, a distributor in the northern Manhattan and Bronx area who was functionally the same as Sano, to Swift, a commercial user, and to Metropolitan Distributors, a truck rental concern which put American gasoline into its rented trucks. In entering judgment against Sano on all counts, the court was primarily persuaded by "the gist of *Secatore's* . . . that if equality cannot help, discrimination cannot injure."²⁵ On the facts the court determined that gasoline was a standardized commodity in a highly competitive industry and, if one could not compete in price for large consumer accounts, he could not compete at all. Therefore, the court reasoned that discrimination in favor of others buying directly from American could not injure Sano's opportunity to compete.²⁶

²³ *Id.* at 667.

²⁴ 187 F. Supp. 345 (E.D. N.Y. 1960).

²⁵ *Id.* at 354.

²⁶ While the Federal Trade Commission has not expressly endorsed the rationale of *Goodman*, *Secatore's*, and *Sano*, it has, perhaps, retreated from the position taken in *United States Rubber Co.*, *supra* note 12. In *Shell Oil Co.*, 54 F.T.C. 1274 (1958), Shell entered into a consent decree which sanctioned lower gasoline prices to taxi fleet user accounts than to gasoline dealers.

Perhaps the most significant aspect of the *Goodman*, *Secatore's*, and *Sano* decisions is that, if the analysis which precluded a finding of injury to competition in those cases of discriminatory prices to direct-buying consumers were to be accepted as valid, the logic would be equally applicable to negate alleged injury to competition in the case of a seller's by-passing the wholesaler and giving lower prices to a direct-buying retailer. The case law has, however, developed differently in the latter type of case. The reason for the different development may result from the historical militancy of wholesalers in favor of both the Robinson-Patman Amendment and functional discounts.

SALES TO DIRECT-BUYING RETAILERS

Functional discounts are an economic recognition by a manufacturing or processing seller of the value of certain services performed by wholesalers and other middlemen. Among others, these services may include warehousing, delivery, assumption of the cost and risk of servicing small retailer accounts, and the training and guidance of small retailers. Due to the precarious financial condition and consequent attrition of many small, marginal retailers, the credit or risktaking function is one of the most important contributions of the wholesaler. Moreover, inasmuch as this risk substantially disappears when the manufacturer is dealing with a large, direct-buying retailer, such a retailer would not be entitled to a functional, or cost-justified discount.²⁷ Unless a manufacturer or processing seller chooses to forego retailing through small businessmen, either he or his distributor must assume the credit risk function. While the Robinson-Patman Amendment was being considered in Congress, wholesalers made a concerted effort to have incorporated into the act functional discounts proportional to the services performed by them on behalf of their sellers. In the original reports of the House and Senate Judiciary Committees, the proposed act included explicit authorization of functional discounts. The House eliminated the provision before the bill was passed and, while the Senate retained the provision in passing the bill, it was eliminated entirely in conference committee.²⁸ It remains unclear from the broad provisions of the act what disposition was finally intended for functional discounts.²⁹

It has been established under the act that a seller who deals simultaneously with buyers at different levels in the chain of distribution does not violate section 2(a) of the act by granting

²⁷ Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess., Ser. 7, at 10-11 (1959).

²⁸ Palamountain, *The Politics of Distribution* 203-31 (1955).

²⁹ See Edwards, *The Price Discrimination Law* 286 n.1 (1959).

functional discounts, or by charging his lowest prices to wholesalers, his next lowest price to retailers, and his highest prices to consumers.³⁰ On the other hand, a seller may not grant his wholesalers or jobbers so-called functional discounts which are so large as to give the wholesalers' customers a competitive advantage over the seller's direct-buying retailer customers; that is, a manufacturer or processing seller may not follow a price policy which favors indirect buyers over direct buyers.³¹ And the seller who establishes a system of functional discounts may not arbitrarily classify his customers; that is, the functional discount granted must bear some relationship to the value and nature of the services performed by the buyer receiving it.³²

It may be argued that the Robinson-Patman Amendment requires functional discounts. If a wholesaler pays the same price as a direct-buying retailer, he is not being compensated for the distributive services he performs for the seller. Inasmuch as the direct-buying retailer does not bear the cost of many wholesaler functions, the single price policy is economically discriminatory.³³ That such an economic discrimination does exist seems to be generally conceded.³⁴ The argument was most fully advanced in *Klien v. Lionel*³⁵ by a retailer customer of a toy jobber against the toy manufacturer, who sold at the same net price to toy jobbers and direct-buying retail chains. The District Court rejected the argument:

It is difficult to see, however, how the conclusion contended for would not result in a flagrant violation of the Robinson-Patman Act and accomplish precisely that which the Act was

³⁰ *Chicago Sugar Co. v. American Sugar Ref. Co.*, 176 F.2d 1, 10 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950). See *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

³¹ *Standard Oil Co. v. FTC*, *supra* note 30.

³² *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952).

³³ Congressman Patman recently wrote:

There is no requirement in the law for a seller to make different prices to different customers. However, the thrust of the Robinson-Patman Act is against discriminatory treatment of customers. For that reason, a seller who has organized his business primarily to sell to wholesalers, depending on them to perform saleswork, warehousing, and other functions incident to the sale and distribution of the seller's products, may be considered to have engaged in discriminatory conduct if he should not make promotional allowances to his wholesaler-customers as compensation to them for the sales promotional work they have performed in promoting the sale of the seller's products. These allowances would be in addition to those made to direct-buying retailer accounts who perform no general sales promotional functions particularly directed to the specific seller's products.

³⁴ See Att'y. Gen. Nat'l Comm. Antitrust Rep. 206 n.246 (1955); Hearings on H.R. 848, *supra* note 27, at 46.

³⁵ 138 F. Supp. 560 (D. Del. 1956), *aff'd on other grounds*, 237 F.2d 13 (3d Cir. 1956).

intended to prevent, viz., a discrimination in price between two purchasers from the same seller.³⁶

The Court of Appeals for the Third Circuit affirmed, but solely on the ground that the indirect-buying retailer was not a customer of the manufacturer and, therefore, could not sue. The argument has also been rejected and a single price policy upheld in Federal Trade Commission proceedings.³⁷

In response to sanctioning by the courts of a single price policy, wholesalers and other middlemen returned to Congress in a new effort to have functional discounts made mandatory under the Robinson-Patman Amendment.³⁸ The bills would have provided, in effect, that when a seller limits the functional classes or number of persons in any functional class to whom he sells, it shall constitute a discrimination within the meaning of section 2(a) of the Clayton Act to fail to maintain a price differential between purchasers based solely upon their functional capacity, and that the price differential shall be in an amount reasonably calculated to enable customers of a functional class entitled to the differential to compete with members of the customers' functional class who purchase directly from the seller. None of the bills was passed.

Although it seems that the act does not proscribe price discrimination favoring direct-buying consumers over retailer and wholesaler customers of the same seller, the prevailing view seems to be that the act does proscribe discrimination favoring direct-buying *retailers* over wholesaler customers of the same seller. The Federal Trade Commission took this position in *Fruitvale Canning Co.*³⁹ Fruitvale was ordered to "cease and desist from discriminating . . . by selling to any retailer at prices lower than those prices charged any wholesaler who competes, or whose customers compete, with such retailer in the sale or distribution of . . . canned fruits."⁴⁰ The same result was reached in private litigation in *Krug v. International Tel. & Tel. Corp.*⁴¹ Krug, a wholesale distributor of defendant's radios, televisions, and phonographs, charged I.T.&T. with direct sales to retailers at prices lower than

³⁶ 138 F. Supp. at 565.

³⁷ Bird & Son, Inc., 25 F.T.C. 548 (1937).

³⁸ See, for example, H.R. 10304, H.R. 10305, H.R. 10640, H.R. 10999, and H.R. 11409, 85th Cong., 2d Sess. (1958); H.R. 848, H.R. 927, H.R. 2788, H.R. 2868, and H.R. 4530, 86th Cong., 1st Sess. (1959); H.R. 3465, H.R. 4151, and H.R. 4529, 87th Cong., 1st Sess. (1961).

³⁹ 52 F.T.C. 1504 (1956).

⁴⁰ *Id.* at 1513.

⁴¹ 142 F. Supp. 230 (D. N.J. 1956).

those charged to Krug. The court, in denying defendant's motion to dismiss, stated:

But there can be no doubt that a violation of section 2(a) may occur where a manufacturer sells his products to a retailer at a lower price than that charged the wholesaler whose customers compete with the retailer. . . . Certainly, one of the well-known purposes of the Robinson-Patman amendment to the Clayton Act was to protect independent wholesalers from discriminatory concessions given by manufacturers to retailers whose size and volume of sales lead to a by-passing of the wholesaling function.⁴²

Should not the rationale of the *Goodman*, *Secatore's*, and *Sano* cases be applicable in the *Fruitvale* and *Krug* cases? In the latter cases it is clear that the seller may follow a single price policy with respect to his wholesaler and retailer customers.⁴³ In such a case both Krug and the wholesaler customers of *Fruitvale* would have to increase the price on resale to cover operating expenses and make a profit. So retailer customers of Krug and *Fruitvale's* wholesaler customers would be paying higher prices than retailers who bought directly from I.T.&T. and *Fruitvale*, respectively. In *Sano* the court observed that if *Sano*, the distributor, could not compete in price, he could not compete at all, since commercial customers would never pay a higher price for a standardized product, gasoline.⁴⁴ Similarly, the Commission found in *Fruitvale* that a lower price of one or two cents per can on canned fruit at the retail level was sufficient to divert customers on both canned fruits and other products to the retailer charging the lower price for canned fruit.⁴⁵ Thus, it might have been found that equality of price to *Fruitvale's* wholesalers would not have helped the wholesalers' customers vis-a-vis direct-buying retailers, and that therefore, price discrimination favoring direct-buying retailers could not further injure competition and was not proscribed by the act. Moreover, the Federal Trade Commission has taken the position that while under present decisions there is a legal difference between a single price policy and a policy favoring direct-buying retailers, there is little practical economic difference.⁴⁶ Moreover,

⁴² *Id.* at 235.

⁴³ *Klein v. Lionel*, *supra* note 35.

⁴⁴ *Sano Petroleum Corp. v. American Oil Co.*, *supra* note 11, at 355.

⁴⁵ *Fruitvale Canning Co.*, *supra* note 39, at 1516.

⁴⁶ Hearings on H.R. 848, *supra* note 27, at 25. The following colloquy took place between Earl W. Kintner, Chairman of the Federal Trade Commission, and Herbert N. Maletz, Chief Counsel to the Sub-Committee:

Mr. Maletz. Now, take a situation where the manufacturer sells only to wholesalers and large retailers and his price to these two groups is the same.

while the court in *Sano* attempted to distinguish *Krug* on the ground that some individual consumers might be willing to pay relatively higher prices because of "considerations of convenience and service," the court also distinguished on the basis that *Krug* was decided before *Secatore's* and the "'practical economics' that controlled *Secatore's* [if equality cannot help, discrimination cannot injure] was not at all discussed in *Krug* and, presumably, was not raised by the defendant" ⁴⁷ The opinion of the court in *Sano* and the position of the Federal Trade Commission might lead to the conclusion that the "gist of *Secatore's*" should be applied to situations in which the wholesaler is by-passed and the direct-buying retailer receives discriminatorily low prices.

It is not so clear, however, that "the gist of *Secatore's*" is compatible either with the objectives of the Robinson-Patman Amendment or with "practical economics" in either the case where a direct-buying consumer is favored vis-a-vis retailers and wholesalers or in the case where a direct-buying retailer is favored vis-a-vis a wholesaler.

COUNTERVAILING POLICY

If it were to be demonstrated by "practical economics" that in no case is it beneficial in terms of economic efficiency to accord price protection to a businessman whose functional status places him further from the consumer than another potentially favored buyer, this would not be an adequate basis for creating case law under the Robinson-Patman Amendment. Economic efficiency is not the sole objective of the antitrust laws. In the Sherman Act prosecution against Alcoa, Judge Learned Hand stated:

It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent upon his own

In that case, is it not true that the small retailer necessarily must pay the wholesaler a higher cost for merchandise than the direct buying retailer?

Mr. Kintner. That is correct.

Mr. Maletz. And does it not follow that the small retailer is at a competitive disadvantage in this kind of situation as compared to the direct buying retailer?

Mr. Kintner. I think that follows.

Mr. Maletz. In practical effect, therefore, is there any real difference between this type of situation, the single pricing system, and the situation condemned by the Federal Trade Commission in the *Fruitvale* case?

Mr. Kintner. Only that you do not have two different prices.

Mr. Maletz. What is the practical economic difference between those two kinds of situations?

Mr. Kintner. There is not a great practical difference.

⁴⁷ *Sano Petroleum Corp. v. American Oil Co.*, *supra* note 11, at 355.

skill and character, to one in which the great mass of those engaged must accept the direction of a few. . . .

We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them. . . . Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.⁴⁸

A similar view was expressed in the dissenting opinion of Justice Douglas in *United States v. Columbia Steel Co.*⁴⁹ It would seem, therefore, that the protection of small businessmen who lack price bargaining power is more than an economic objective: it is also a political postulate.

In the passage of the Robinson-Patman Amendment some attempt was made to protect small businessmen from the rigors of free and open competition. This social or political objective was carried forward by Congress "in the Miller-Tydings and McGuire Acts and in the creation of the Small Business Administration."⁵⁰ In *Brown Shoe Co. v. United States*,⁵¹ a prosecution under section 7 of the Clayton Act, the Supreme Court observed:

It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition for the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.⁵²

In listing the several important changes made by the Robinson-Patman Amendment, the court in *Sano* observed that "the shift in emphasis is said to be from injury to the market to injury to the competitor."⁵³ Regardless whether it is thwarted in substantial amount, the political postulate is not embodied in the

⁴⁸ *United States v. Aluminum Company of America*, 148 F.2d 416, 427-29 (2d Cir. 1945).

⁴⁹ 334 U.S. 495, 536 (1948) (Douglas, J., dissenting).

⁵⁰ Burns, *A Study of the Antitrust Laws* 509 (1958).

⁵¹ 370 U.S. 294 (1962).

⁵² *Id.* at 344.

⁵³ *Sano Petroleum Corp. v. American Oil Co.*, *supra* note 11, at 352.

neat phrase "if equality cannot help, discrimination cannot injure."

Protection of the wholesaler or other middleman affords protection to many small businesses beyond the wholesaling industry.

In a true sense, the wholesale distributor is the banker and financier for his retailers and suppliers. He pays the manufacturer shortly after the receipt of goods and extends credit to the retailer.

Inasmuch as 97 percent of these small businessmen enjoy no mercantile or commercial credit rating, this relationship has no equal in the American industrial economy.

If deprived of the wholesaler's credit, granted chiefly on the basis of character and confidence, the retail merchant could not long survive in business.

Should the wholesaler disappear from the economic picture, very few new small retail enterprises could be started.⁵⁴

Predictions of the small businessman's demise have been exaggerated. In 1932, it was predicted that if the relative rate of growth of large companies from 1909 to 1929 were to continue, by 1950 seventy percent of all corporate activity would be carried on by 200 corporations.⁵⁵ The figure proved to be 40.5 percent.⁵⁶

In an attack which assumes that the political postulate that the protection of small, independent businessmen is a desirable objective regardless of its effect on competition has found too cozy a home in the Robinson-Patman Amendment, the Amendment has been decried by many as an undesirable, anticompetitive adjunct to the antitrust laws, in conflict with the basic public policy toward competition expressed in the Sherman Act.⁵⁷ In this context the Supreme Court stated in *Automatic Canteen Co. v. FTC*:

Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where Con-

⁵⁴ Hearings on H.R. 848, *supra* note 27, at 7.

⁵⁵ Berle & Means, *The Modern Corporation and Private Property* 40 (1932).

⁵⁶ Federal Trade Commission, "Report on Changes in Concentration in Manufacturing, 1935 to 1947 and 1950" at 17 (1954). A.D.H. Kaplan of the Brookings Institute estimated that in 1929 the 100 largest industrial corporations had 25.5% of the assets and 43.4% of the income before taxes of all industrial corporations. According to his estimates, by 1948 the corresponding percentage of assets was 26.7, a rise of 1.2 percentage points, and the corresponding percentage of profits was 30.4, a fall of 13 percentage points. See Kaplan, *Big Enterprise and the Competitive System* 126-27 (1954).

⁵⁷ Burns, *op. cit. supra* note 50, at 117-22.

gress has told us not to, with the broader antitrust policies that have been laid down by Congress.⁵⁸

A concept fundamental to competition is that the inefficient, whether small or large, not only will but should be destroyed by the competitive process! The Federal Trade Commission opposed mandatory functional discounts as conducive of undue rigidity in the channels of distribution.⁵⁹ It is argued that the Robinson-Patman Amendment is a form of public regulation which tends to result in price uniformity and rigidity rather than vigorously competitive price policies leading to lower prices, and that it impedes the development and introduction of cheaper and more efficient methods of production and distribution.⁶⁰ It may be something of this desire to reconcile the Robinson-Patman Amendment with the policies of the Sherman Act that helped the courts in *Goodman*, *Sano*, and *Secatore's* to conclude that "if equality cannot help, discrimination cannot injure."

Apart from the political postulate, there may be economic reasons why the phrase is an inapt addition to Robinson-Patman law. It is difficult to see how injury to competition can be evaluated without some prior determination of why a discriminatory price policy was effected by the seller. A variety of reasons—some licit, some illicit—may account for price differential policies. In terms of broad categories, businessmen may discriminate in price (1) to meet the equally low price of a rival seller; (2) to take advantage of efficiencies of quantity sales or particular methods of dealing; (3) predatorily, to eliminate a weaker rival; or (4) in response to the coercion of oligopolistic buyers.⁶¹

If a seller cuts prices to selected buyers to meet the equally low lawful price of a competitor,⁶² he is fully protected by the proviso of section 2(b) of the Robinson-Patman Amendment. Moreover, a good faith meeting of the competition is an absolute defense; that is, the defense will prevail even if it is shown that the price differential was injurious to competition in terms of unfavored buyers from the seller invoking the defense.⁶³

If the seller cuts prices to certain buyers to take advantage of the efficiencies of quantity sales or particular methods of dealing, he is protected by the first proviso of section 2(b) of the Robinson-

⁵⁸ 346 U.S. 61, 74 (1953).

⁵⁹ Hearings on H.R. 848, *supra* note 27, at 24.

⁶⁰ Burns, *op. cit. supra* note 50, at 513-14.

⁶¹ Stocking, Workable Competition and Antitrust Policy 228-29 (1961).

⁶² The competitor must be the seller's own, and not a competitor of the buyer. *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963).

⁶³ *Standard Oil Co. v. FTC*, *supra* note 30.

Patman Amendment.⁶⁴ Thus, any actual efficiencies of mass distribution or direct distribution to large buyers are without the proscription of the act. Although the question remains unsettled, an exception to the protection of the cost justification proviso may occur in the area of marginal cost pricing. A seller with excess capacity will reduce his losses or increase his profits by the amount that the price of additional sales exceeds the marginal cost of those sales, even though the price on such additional sales is insufficient to cover the average cost per sale based on the total fixed and variable costs of all sales. The practice of marginal cost pricing may be economically justifiable, but it is questionable whether it is protected under the cost justification proviso; a manufacturing or processing seller's advantages from sales based on marginal cost prices would relate in substantial part to greater use of production capacity, but the cost justification proviso is only available where economics of manufacturing, sales, or delivery are related to distribution techniques, sales or delivery.⁶⁵ The significance of marginal cost pricing, however, regardless of whether it is proscribed by the Robinson-Patman Act, cannot be too great because empirical data indicates that very little production is controlled by marginal cost pricing.⁶⁶ Moreover, the Attorney General's Committee has suggested that the terms of the present act might be so applied as to "impede no price variation reasonably related to economies in *any* of the seller's costs deriving from significant differences among customers or broad categories of commercial transactions."⁶⁷

In any case in which the seller engages in predatory price discrimination to drive a weaker rival out of the market, he ought not have a defense under the Robinson-Patman Amendment, even though there is no showing of a general injury to competition. This is the prevailing rule with respect to selective or geographic price cutting aimed at eliminating a smaller, localized rival in horizontal competition with the discriminating seller.⁶⁸ The difficulty of showing injury to competition where but one small businessman is eliminated from the market was one of the reasons why the emphasis on injury to competition in section 2 of the Clayton Act was shifted, in part, to injury to a competitor under the Robinson-Patman Amendment.⁶⁹ Apart from the political postulate supporting

⁶⁴ See *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951).

⁶⁵ Att'y. Gen. Nat'l Comm. Antitrust Rep. 172 (1955).

⁶⁶ Means, *Pricing Power and Public Interest* 205-12 (1962).

⁶⁷ Att'y. Gen. Nat'l Comm. Antitrust Rep. 175 (1955).

⁶⁸ *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

⁶⁹ S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936) stated:

It tends to exclude from the bill otherwise harmless violations of its letter, but accomplishes a substantial broadening of a similar clause now contained in

the Robinson-Patman Amendment, and apart from any consideration of business ethics, it is difficult to see how the elimination of a smaller rival through predatory price discrimination can be economically justified. This is a demise by definition unrelated to either overall economic efficiency of the discriminating seller or the relative economic inefficiency of the smaller rival toward whom the unfair competition is directed. On the contrary, a successful attack can only lead to further monopolization or oligopolization, and a concomitant increase in the power of the discriminating seller to establish non-competitive prices. Moreover, there is no reason why the same anti-competitive result would not obtain by the predatory, non-economic elimination of a competitor or potential competitor, whether or not he is also a customer, if he is in the succession of markets of vertical distribution rather than in horizontal markets. The discriminating seller has additional power to control prices in vertical channels—power unrelated to demonstrated efficiencies in distribution techniques.

Perhaps the justification for price discrimination becomes most equivocal in terms of injury to competition where a seller is coerced into cutting his prices by the pressure of an oligopolistic or powerful buyer. In considering this explanation for price discrimination, however, it must be distinguished from price differentials which are either cost-justified, or result from meeting competition in good faith. Price concessions to a powerful buyer may exceed differentials related either to market competition or to economic efficiencies of size or method. In *Fruitvale Canning Co.*⁷⁰ the Federal Trade Commission took the position that "as we view it, the main thrust of the Robinson-Patman Act was to curb the predatory use of monopoly power by chain stores and mass buyers and to preserve the place of small business as well as to protect its competitive position."⁷¹ I submit, however, that the future objective in the development of Robinson-Patman law ought to be the preservation of a competitive economic structure designed to serve the overriding interests of consumers rather than to protect the status of individual firms, whatever their size and whatever their position in vertical channels of distribution. Inasmuch as notions of "perfect" or "pure" competition are only of historical or academic interest,

section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger injury result, and to catch the weed in the seed will keep it from coming to flower.

⁷⁰ *Fruitvale Canning Co.*, *supra* note 39.

⁷¹ *Id.* at 1517.

and concepts of "effective" or "workable" competition are the tools of economic analysis, the difficult question arises as to what constitutes a competitive market structure in vertical markets.

The question of vertical conflicts in distribution—"the vertical struggle between different levels of distribution, between manufacturer and wholesaler, wholesaler and retailer, or manufacturer and retailer"—is neglected by economic theoreticians, who in the past have focused on horizontal and intertype competition.⁷² While case law dealing with vertical conflicts in distribution, in accordance with the mandate of the Robinson-Patman Amendment, deals in substantial part with the notion of injury to competition, in the one economic thesis dealing with vertical conflicts in distribution, John Kenneth Galbraith suggests that the shortcoming of "workable competition" as an analytical tool "lies in the preoccupation with competition."⁷³ Galbraith contended that "power on one side of the market creates both the need for, and the prospect of reward to, the exercise of countervailing power from the other side."⁷⁴ Thus, the public interest is theoretically protected by big seller against big buyer, big employer against big government, big employer against big union, and so on. Although the buying power of chain stores was a major factor behind the adoption of the Robinson-Patman Amendment, Galbraith specially condemns the application of the Robinson-Patman Act to the grocery chains on the ground that they developed in response to the original power of food processors and producers, and the concessions obtained by the vigorous bargaining of the chains operated effectively in the interest of consumers.⁷⁵ Thus, under this thesis administration of the Robinson-Patman Amendment ought not to proscribe price discrimination coerced from a seller by the excessive market power of the buyer.

The efficacy of the Galbraithian thesis is not, however, beyond dispute, even in the food industry. One study of the food industry indicated that the large sellers who discriminated in favor of the chains were able to entrench themselves and retain a highly remunerative price structure in sales to buyers other than the chains, and the net result of the power on opposite sides of the market was to soften competition.⁷⁶ Furthermore, countervailing power does not control every industry. For example, Galbraith

⁷² Palamountain, *op. cit. supra* note 28, at 48-49.

⁷³ Galbraith, *American Capitalism: The Concept of Countervailing Power* 61 (1952).

⁷⁴ *Id.* at 120.

⁷⁵ *Id.* at 147-49.

⁷⁶ Dirlam & Kahn, *Antitrust Law and Big Buyer, Another Look at the A. & P. Case 225* (1952).

noted that the oil industry had secured itself from the exercise of countervailing power⁷⁷ and, while a progressive industry, oil "is an unquestioned oligopoly. . . [and] it has rarely been free of the suspicion of holding prices above the level that would be associated with more vigorous price competition."⁷⁸ It was in the oil industry that the courts in *Secatore's* and *Sano* found such keen price competition that they refused to heed cries from what Galbraith would there call the weak side of the market. Whatever the validity of the concept of countervailing power, however, its incorporation into the antitrust laws would seem to rest with the discretion of Congress; the history of the Robinson-Patman Amendment as it now stands would tend to indicate a Congressional intent to prohibit the excessive use of vertical power and limit concessions to powerful buyers to demonstrable cost savings resulting from the economic efficiencies of their market position.

CONCLUSION

Neither *Goodman*, *Secatore's* nor *Sano* reached the question of why the respective sellers had followed concededly discriminatory price policies. Yet in terms of both the political and economic justifications for the Robinson-Patman Amendment, predatory price discrimination and price discrimination in response to the excessive market power of favored buyers may be anti-competitive in effect. While the phrase "if equality cannot help, discrimination cannot injure" may have some logical appeal, it finds no expression in the act or its history. The Supreme Court has concluded that "the statute does not require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that it 'may' have such effect."⁷⁹ Perhaps an argument that "the greater the price discrimination, the more likely the injury to competition" would be an appropriate answer to "the gist of *Secatore's*." The simple formula of adding overhead and profit to a middleman's price to read him or his customer's out of effective competition with direct buyers lower in the channel of distribution, even while purportedly taking account of customer service, convenience, and other non-price factors of competition, seems to be an oversimplification of both the economic and political postulates which control the administration of the Robinson-Patman Amendment. Moreover, it invites perpetuation of concessions to buyers resulting from excessive market power rather than cost justification;

⁷⁷ Galbraith, *op. cit. supra* note 73, at 127.

⁷⁸ *Id.* at 97.

⁷⁹ *Corn Products Co. v. FTC*, 324 U.S. 726, 742 (1945).

and it invites the predatory destruction of vertical competitors with the objective not of more efficient distribution, but rather of vertical integration or control to facilitate the effectuation of non-competitive price policies.

The act does not proscribe rigid channels of distribution; any seller is free to adopt a mixed policy of distribution channels or even to eliminate middlemen entirely.⁸⁰ While the act permits the seller the choice of selling to the consumer and the retailer at the same price, or refusing to sell to either of them, it should not permit him to increase the competitive disadvantage to the retailer once he has decided to sell to both. Similarly while it permits the seller the choice of selling to the wholesaler and the retailer at the same price, or refusing to sell to either of them, it should not permit him to increase the competitive disadvantage to the wholesaler once he has decided to sell to both.

Allan R. Rule

⁸⁰ *Chicago Sugar Co. v. American Sugar Ref. Co.*, 176 F.2d 1, 10 (7th Cir. 1949), *cert. denied*, 138 U.S. 948 (1950).